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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/015,616	01/29/1998	JEAN NORVELL	FA/141A	5936

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12/16/2002

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EXAMINER

JUSKA, CHERYL ANN

ART UNIT

PAPER NUMBER

1771

DATE MAILED: 12/16/2002

19 20

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No. 09/015,616	Applicant(s) NORVELL ET AL.	
	Examiner Cheryl Juska	Art Unit 1771	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 21 August 2002.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-52 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-52 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s). _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on August 21, 2002, has been entered.

Response to Amendment

2. Amendment C, submitted as Paper No. 18 on August 21, 2002, has been entered. The specification has been amended as requested. Claim 53 has been cancelled. Thus, the pending claims are 1-52.

3. Said amendment is sufficient to withdraw the objection to the specification as set forth in section 5 of the last Office Action. Additionally, Applicant's arguments with respect to the 112, 1st rejection (Amendment C, page2-3) are sufficient to withdraw said rejection (section 7 of the last Office Action). Also, the cancellation of claim 53 renders moot the 102 rejection set forth in section 9 of the last Office Action. Furthermore, with respect to the prior art rejections based upon US 5,026,591 issued to Henn, Applicant's traversal (Amendment C, pages 4-5) regarding the wear test cycles to leakage property has been found persuasive. Thus, the prior art Henn rejections of claims 1-34, 36-38, 41-43, 49, and 50 are hereby withdrawn.

Claim Rejections - 35 USC § 112

4. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

5. Claims 1-34, 36-38, 41-43, 49, and 50 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims 1-34, 36-38, 41-43, 49, and 50 are indefinite because they fail to set forth the composition or structure of the flocked article and only claim properties of said article. Claims that merely set forth physical characteristics desired in an article, and not setting forth specific compositions which would meet such characteristics are invalid as vague, indefinite, and functional since they cover any conceivable combination of ingredients either presently existing or which might be discovered in the future. *Ex parte Slob* (PO BdApp) 157 USPQ 172.

The Applicant has failed to set forth sufficient structural limitations to the claimed flocked article. In Amendment C, Applicant asserts that the presently claimed wear test cycles to leakage values are not inherent to all analogous flocked substrates (Amendment C, page 4, 2nd paragraph). Specifically, Applicant notes comparative examples of the specification which meet the structural and chemical limitations of the present claims, but which do not possess the presently claimed leakage values. Thus, one must ask, "What structural limitations produce this claimed leakage property?" The structural limitations which are claimed are not sufficient to produce the claimed property according to Applicant's arguments in Amendment C. For example, 1B of Comparative Example 1 and 6C of Example 6, both comprise identical laminate face fabrics, ePTFE membranes, flock compositions, and polyurethane adhesives. Yet, said

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examples produce significantly different leakage values (i.e., 1 cycle vs. 4080 cycles). What is the distinctive structural and/or chemical difference which produces such a vast difference in leakage cycles?

In other words, since the claims only recite the properties produced by the flocked article, without claiming sufficient structural or chemical composition, it is unclear what structure and chemistry would meet the recited properties. Thus, the scope of the claims is indefinite.

Claim Rejections - 35 USC § 103

6. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

7. Claims 35, 39, 40, and 51 stand rejected under 35 U.S.C. 103(a) as being unpatentable over the cited Henn patent, for the reasons of record.

8. Claims 44-48 and 52 stand rejected under 35 U.S.C. 103(a) as being unpatentable over the cited Henn patent in view of US 5,262,234 issued to Minor, for the reasons of record.

Response to Arguments

9. Applicant's arguments filed with Amendment C have been fully considered but they are not persuasive with respect to the above standing prior art rejections. Specifically, Applicant traverses all the rejections with the lack of inherency of the claimed abrasion to leakage values. However, said leakage values are not recited in all the pending claims. Thus, the rejections of claims 35, 39, 40, 44-48, 51, and 52, which are not drawn to leakage values, are hereby maintained.

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Claim Rejections - 35 USC § 102/103

10. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

11. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Amended 12. Claims 27, 28, 31-34, and 50 are rejected under 35 U.S.C. 102(b) as being anticipated by, or in the alternative, under 35 U.S.C. 103(a) as being unpatentable over US 5,126,182 issued to Lumb et al.

Claim 27 is drawn to a flocked article comprising (a) a substrate having a first side which is water and wind resistant, but breathable and (b) a layer of flock in which at least a portion of said flock stands on end, and wherein said article has a wear test cycles to leakage of at least 50 cycles.

Lumb discloses a drapable, water vapor permeable (i.e., breathable), wind and water resistant composite fabric (abstract). Said composite comprises a fabric substrate, a layer of foamed breathable adhesive, and a fabric material layer of flocked fibers (abstract). The figure shows the flock standing on end. The adhesive may be an acrylic polyurethane (col. 4, lines 1-6). Lumb teaches the flocked composite fabric is suited for an outerwear garment (col. 4, lines 54-64).

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Although Lumb does not explicitly teach the limitations of wear test cycles to leakage, it is reasonable to presume that said limitations are inherent to the invention. Support for said presumption is found in the use of similar materials (i.e., wind and water resistant and breathable substrate having a flocked fiber layer thereon) to produce the flocked article. The burden is upon the Applicant to prove otherwise. *In re Fitzgerald*, 205 USPQ 495. In the alternative, the claimed leakage cycles would obviously have been provided by the flocked article disclosed by Lumb. Note *In re Best*, 195 USPQ 433, footnote 4 (CCPA 1977) as to the providing of this rejection under 35 USC 103 in addition to the rejection made above under 35 USC 102. Therefore, claims 27, 28, 31-34, and 50 are rejected as being anticipated by or obvious over the cited Lumb reference.


Conclusion

13. Any inquiry concerning this communication or earlier communications from the Examiner should be directed to Cheryl Juska whose telephone number is 703-305-4472. The Examiner can normally be reached on Monday-Friday 10am-6pm.

If attempts to reach the Examiner by telephone are unsuccessful, the Examiner's supervisor, Terrel Morris can be reached on 703-308-2414. The fax phone numbers for the organization where this application or proceeding is assigned are 703-872-9310 for regular communications and 703-872-9311 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0661.

cj
December 15, 2002



CHERYL A. JUSKA
PRIMARY EXAMINER